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November 13, 2001

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VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.*

Complaint of Access Integrated Network, Inc. Against BellSouth Telecommunications, Inc.

Docket No. 01-00868

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Brief Addressing Section 65-4-122. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.*

Complaint of Access Integrated Network, Inc. Against BellSouth Telecommunications, Inc.

Docket No. 01-00868

BELLSOUTH TELECOMMUNICATIONS, INC.'S
BRIEF ADDRESSING SECTION 65-4-122

By Order dated November 6, 2001, the Hearing Officer correctly noted that §65-4-122(e) of the Tennessee Code Annotated provides that "[a]n action may be brought by any person against any person or corporation, owning or operating such public service company in Tennessee, for the violation of this section, before any court having jurisdiction to try the same." See Order at 11-12. The Hearing Officer then ordered the parties to "submit legal briefs on the issue of whether the Authority is a 'court' as that term is used in Tenn. Code Ann. §65-4-122." *Id.* at 12, 14. In compliance with that directive, BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Brief, which explains that the Authority is not a "court" as that term is used in this section of the Code and that the TRA cannot impose fines for unjust discrimination, extortion, or any of the other practices prohibited by section 65-4-122.

I. The Authority is not a "Court" as that Term is Used in T.C.A. §65-4-122(e).

Actions for alleged violations of section 65-4-122 of the Tennessee Code must be brought "before any court having jurisdiction to try the same." T.C.A. §65-4-122(e). The Authority "is an administrative agency exercising co-mingled legislative, executive, and judicial functions,"¹ and both the statutes governing the Authority² and the Uniform Administrative Procedures Act³ clearly distinguish between the Authority and a court. The Authority, therefore, is not a court, and it has no jurisdiction to hear any action alleging violations of section 65-4-122.

II. The TRA Can Address Discriminatory or Preferential Pricing, but it Cannot Impose Fines for such Practices.

The price regulation statutes under which BellSouth operates provide that "[r]ates for telecommunications services are just and reasonable when they are determined to be affordable as set forth in this section." See T.C.A. §65-5-209(a). They also provide that upon approval of its price regulation plan, an incumbent like BellSouth may collect "such rates that are less than or equal to the maximum permitted by this section and subject to . . . the non-discrimination provisions of this title." *Id.*, §65-5-209(b). Compliance with the price caps set forth in the price regulation statutes, therefore, does not necessarily equate to compliance with the

¹ *Tennessee Cable Telev. Ass'n v. Public Serv. Comm'n*, 844 S.W.2d 151, 158 (Tenn. Ct. App. 1992).

² See, e.g., T.C.A. §§65-2-109(a) ("The authority shall not be bound by the rules of evidence applicable in a court . . .").

³ See, e.g., T.C.A. §§4-5-221(c) (setting forth the conditions under which the text of the rules appearing in the administrative code may be "used in all courts, agencies, departments, offices of and proceeding in the state of Tennessee"); 4-5-223(b) (an agency's declaratory order is binding between the agency and the parties "unless altered or set aside by the agency or a court in a proper proceeding").

non-discrimination provisions of Title 65, and if the Authority finds that an existing rate or charge is unjustly discriminatory or preferential, the Authority arguably has the power, after a hearing, to order that the rate be adjusted to ameliorate the unjust discrimination or preference. T.C.A. §65-5-201. The Authority, however, has no statutory power to impose a fine upon a public utility for having charged a rate that it determines is discriminatory or unduly preferential.⁴

Respectfully submitted,

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⁴ While section 65-4-120 generally allows the Authority to impose penalties of \$50.00 per day for violation of "any lawful order, judgment, finding, rule or requirement of the authority," section 65-4-122 specifically addresses actions alleging extortion or unjust discrimination, and it provides that such actions are to be brought "before any court having jurisdiction to try the same." Under Tennessee law, a specific statutory provision will control over a more general statutory provision. *See Washington v. Robertson County*, 29 S.W.2d 466, 475 (Tenn. 2000). The specific statutory provisions of section 65-4-122, therefore, control over the general statutory provisions of section 65-4-120, and the TRA has no authority to impose fines for discrimination or extortion. If this were not the case, the Authority could enact a rule that says exactly what section 65-4-122 says, impose fines for a violation of that rule, and circumvent the statutory requirement that actions seeking such fines be brought before a court.

CERTIFICATE OF SERVICE

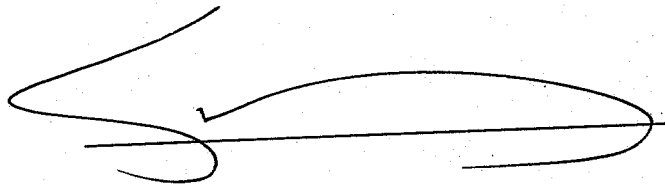
I hereby certify that on November 13, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☐ Hand
- ☐ Mail
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A handwritten signature in dark ink, consisting of a large, stylized loop followed by a horizontal line and a small flourish at the end.